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No. 94-1474

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF IDAHO, ET AL., PETITIONERS

v.

COEUR D'ALENE TRIBE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The petition for a writ of certiorari presents two questions for this Court's review. The United States will address the second question, which is:

Whether, if the federal courts have jurisdiction over this action, the Coeur d'Alene Tribe's suit should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief can be granted.

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INTEREST OF THE UNITED STATES

The Coeur d'Alene Tribe brought this action to confirm its title to submerged lands beneath Lake Coeur d'Alene and other navigable watercourses and to enjoin the State of Idaho and its officials from taking actions that are inconsistent with the Tribe's rights. As trustee on behalf of the Coeur d'Alene Tribe, the United States has filed a separate action against the State of Idaho asserting that, by virtue of congressional and executive actions, the Tribe has a beneficial interest in a portion of those submerged lands. See *United States* v. *Idaho*, No. CV 94-328-N-EJL (D. Idaho filed July 19, 1994); Br. in Opp. App. 22-31. The United States accordingly has a direct interest in the subject matter of the Tribe's suit.

STATEMENT

The Coeur d'Alene Tribe and certain tribal members (the Tribe) brought suit in the United States District Court for the District of Idaho against petitioners State of Idaho, certain state agencies, and certain state officials. The Tribe alleged that it has a legal interest in the submerged lands beneath Lake Coeur d'Alene and related watercourses, and it sought to quiet its title and enjoin petitioners from taking actions inconsistent with the Tribe's rights. The district court dismissed the suit, ruling that the Tribe's action to quiet title is barred by the Eleventh Amendment and that the Tribe has failed to state an actionable claim for injunctive relief against the state officials. Pet. App. 29-49. The court of appeals reversed in part, holding that the Tribe's suit against the state officials is actionable under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and that the district court's dismissal for failure to state a claim was in error. Pet. App. 1-28.

1. The Coeur d'Alene Tribe of Idaho is a federally acknowledged Indian tribe. See 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. Pt. 83. This case involves a long-standing dispute between the Tribe and the State of Idaho over the Tribe's claim to submerged lands within the State's borders. As noted in our Statement of Interest, that dispute is also the subject of a federal suit filed by the United States on behalf of the Tribe. We therefore provide a brief summary of the history concerning the Tribe's title claims.

a. At the time of the founding of the United States, the Coeur d'Alene Tribe occupied what is now known as the Lake Coeur d'Alene region of the State of Idaho. The records of the Lewis and Clark expedition

of 1804 noted the existence of the Tribe in that area. Other nineteenth century explorers, fur traders, and missionaries identified the Coeur d'Alene Tribe as a distinct Indian community that used and resided around Lake Coeur d'Alene. See *Coeur d'Alene Tribe of Indians* v. *United States*, 4 Ind. Cl. Comm'n 1 (1955) and 6 Ind. Cl. Comm'n 1 (1957).

b. The United States acquired fee title to the Lake Coeur d'Alene region through the Treaty with Great Britain, 9 Stat. 869 (proclaimed Aug. 5, 1846). It initially placed those lands within the Oregon Territory, Act of Aug. 14, 1848, ch. 177, § 1, 9 Stat. 323, and later within the Washington Territory, Act of Mar. 2, 1853, ch. 90, § 1, 10 Stat. 172. The arrival of non-Indian settlers in the region led to conflicts between the United States and the Tribe, which, in 1858, culminated in the Steptoe Wars. The United States and the Tribe ended those hostilities through a brief written agreement that did not provide for the cession of any of the Tribe's aboriginal lands. See S. Exec. Doc. No. 1, 35th Cong., 2d Sess. 408-410 (1859) (Report of the Secretary of War).

c. In 1863, Congress established the Idaho Territory, which embraced most of the Coeur d'Alene Tribe's aboriginal lands. See Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 809. Congress, however, preserved the "rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." *Ibid.* Congress also preserved the United States' existing powers respecting those Tribes. *Id.* § 17, 12 Stat. 814.

d. Four years later, on May 23, 1867, the Commissioner of Indian Affairs informed the Secretary of the Interior that "a necessity exists for some arrangement under which the [Coeur d'Alene and

other Tribes] should have some fixed home set apart for them before the lands are all occupied by the whites, who are rapidly prospecting the country." 1 C. Kappler, *Indian Affairs: Laws and Treaties* 835 (1904). The Commissioner stated that "such arrangements can now be made by direct action of the Department." *Ibid.* See *Grisar* v. *McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868) (recognizing the practice of the President to set apart public lands for public uses).

The Secretary of the Interior transmitted that recommendation to the Commissioner of the General Land Office, who agreed that a specific reservation should be set aside for various Indian groups, including the Coeur d'Alene Tribe. The Commissioner of the General Land Office noted that "no surveys of the public lands have been made in those portions of Idaho Territory, nor is this office advised of the extinguishment of Indian titles to the same guarantied to them by the [Act of Mar. 3, 1863]." 1 C. Kappler, *supra*, at 836. But he nevertheless stated that "[t]he records of this office show[] no objection to the policy recommended to the Department by the Commissioner of Indian Affairs." *Ibid.*

The Secretary of the Interior recommended to President Andrew Johnson that he set aside a reservation for the Coeur d'Alene Tribe in accordance with the Indian Commissioner's recommendation. 1 C. Kappler, *supra*, at 837. The President set aside those lands as recommended by the Secretary. *Ibid.* That reservation, however, included only a small portion of Lake Coeur d'Alene, and the Tribe refused to accept it. In 1873, the Department of the Interior dispatched three commissioners to negotiate a relinquishment of the Tribe's aboriginal title and to

establish an acceptable reservation for the Tribe. *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6.

e. On July 28, 1873, the United States and the Coeur d'Alene Tribe entered into a written agreement in which the Tribe "agreed to relinquish to the Government all right and title in and to all lands theretofore claimed by said tribe, lying outside of the proposed reservation," which was described therein. See *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6. The agreement provided that it would not be binding unless approved by Congress, but Congress failed to take action on it. *Ibid.* On November 8, 1873, President Grant issued an Executive Order establishing a reservation for the Coeur d'Alene Tribe. 1 C. Kappler, *supra*, at 837. Although the description of the reservation varied in some respects from the description contained in the July 28, 1873, agreement (see 4 Ind. Cl. Comm'n at 6), both descriptions embraced all of Lake Coeur d'Alene. See Br. in Opp. App. 32 (map).

f. In 1886, Congress provided for the Secretary of the Interior "to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States," additionally stating that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, ch. 333, § 1, 24 Stat. 44; see *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 6-7. Pursuant to that Act, commissioners appointed by the United States and the Coeur d'Alene Tribe entered into an agreement on March 26, 1887, in which the Tribe agreed to accept $150,000 in return for its cession of all of its aboriginal lands "with the exception of the * * * Coeur d'Alene Reservation." See 1 C. Kappler, *supra*, at 419-422. Congress later ratified

that agreement. See Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026-1029.

g. The discovery of valuable minerals in the Lake Coeur d'Alene region created additional demands for non-Indian use of the lands and waters within the Coeur d'Alene Reservation. On January 23, 1888, the Senate passed a resolution directing the Secretary to report on "the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." S. Misc. Doc. No. 36, 50th Cong., 1st. Sess. 1 (1888). The Secretary responded that the Coeur d'Alene Reservation included Lake Coeur d'Alene and a portion of the Coeur d'Alene and St. Joseph Rivers. S. Exec. Doc. No. 76, 50th Cong., 1st. Sess. 1-2 (1888).

h. That same year, Congress enacted a statute provisionally granting the Idaho and Washington Railroad Company a right of way "for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160. The Act provided that the center line of the right of way shall be located "along the east side of the Coeur d'Alene Lake" and extend 75 feet in either direction from the center line. *Id.* §§ 1, 2, 25 Stat. 160-161. The Act stated that "the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company." *Id.* § 3, 25 Stat. 161. The Act also provided for

"compensation to be paid the Indians for such right of way" (*ibid.*) and directed that the railroad shall not "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land" (*id.* § 5, 25 Stat. 161).

i. On March 2, 1889, Congress directed the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002. The ensuing negotiations resulted in an agreement of September 8, 1889, in which the Tribe agreed to a diminishment of its reservation in return for a cash payment of $500,000. See 1 C. Kappler, *supra*, at 422-423. Under that agreement, the northern boundary of the diminished reservation crossed Lake Coeur d'Alene, leaving the lower one-third of the lake within the boundary of the reservation. Congress later ratified that agreement. See Act of Mar. 3, 1891, ch. 543, § 20, 26 Stat. 1029-1030.

j. Congress admitted Idaho to the Union on July 3, 1890. Act of July 3, 1890, ch. 656, 26 Stat. 215. The Act providing for Idaho's admission to the Union "accepted, ratified, and confirmed" the Constitution that had been approved by the people of the Idaho Territory. § 1, 26 Stat. 215. At the time of adoption, the Idaho Constitution provided:

> [T]he people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian

> tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Idaho Const. of 1889, art. XXI, § 19.

k. In 1893, Congress directed the Secretary of the Interior "to negotiate with the Coeur d'Alene Indians for a change of the northern line of their reservation, so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located." Act of Mar. 3, 1893, ch. 209, § 1, 27 Stat. 616. The negotiations resulted in an agreement of February 7, 1894, 1 C. Kappler, *supra*, at 531, which Congress ratified in the Act of August 15, 1894, ch. 290, § 14, 28 Stat. 322. The Tribe received $15,000 for the strip of land. Under that agreement, a western north-south boundary line and a northern east-west boundary line of the Coeur d'Alene Reservation cross the bed of Lake Coeur d'Alene. *Ibid.*

l. In 1906, Congress enacted legislation providing for the allotment of the Coeur d'Alene Reservation. Allotment Act of 1906, ch. 3504, 34 Stat. 335. As a result of the allotment process, the land held in trust for the Tribe within the Reservation was reduced from 335,000 acres to 58,000 acres. Before allotment, Congress withdrew from the Coeur d'Alene Reservation approximately 7,800 acres of upland and submerged land for sale to the State of Idaho, which purchased those lands for the creation of Heybrun State Park. Congress specified that the proceeds from the sale would be deposited in the United States

Treasury for the use and benefit of the Coeur d'Alene Tribe. Act of Apr. 30, 1908, ch. 153, 35 Stat. 78-79.

m. In 1946, Congress created the Indian Claims Commission. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049. See generally *United States* v. *Dann*, 470 U.S. 39 (1985). The Coeur d'Alene Tribe brought a Claims Commission action against the United States, seeking compensation for loss of aboriginal lands and for alleged breaches of fair and honorable dealings with the Tribe. The Indian Claims Commission found that the Tribe had aboriginal title to lands comprising the Lake Coeur d'Alene region, *Coeur d'Alene Tribe*, 4 Ind. Cl. Comm'n at 11-12, and that the United States' past payment for those lands was insufficient to satisfy its obligation of fair and honorable dealings, 6 Ind. Cl. Comm'n at 36-37. The Commission awarded the Tribe $4,427,778.03, less allowable offsets, for lands outside of the 1873 boundaries of the Reservation. *Id.* at 67.

2. On October 15, 1991, the Tribe filed a complaint against petitioners respecting the use and ownership of submerged lands within the 1873 boundaries of the Coeur d'Alene Reservation. The Tribe asserted that it retained unextinguished aboriginal title to the submerged lands and that it was entitled to exclusive use and occupancy of those lands by virtue of the United States' creation of the Coeur d'Alene Reservation. It asked the district court to issue an order establishing the Tribe's title and enjoining petitioners from interfering with its property interests. Pet. App. 3, 30-31; Br. in Opp. App. 3-14 (complaint). Petitioners did not answer the complaint, but instead filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Pet. App. 3, 31. Petitioners contended that the Eleventh Amendment

barred the Tribe's suit and that the Tribe had failed to state a claim upon which relief could be granted. See Br. in Opp. 15-17 (motion); J.A. 2-28.

The district court granted petitioners' motion to dismiss. Pet. App. 29-49. It concluded that the Tribe's claims against the State of Idaho and the state agencies are barred by the Eleventh Amendment because those claims seek federal judicial relief against the State. *Id.* at 32-37. The court also concluded that the Tribe's claims against state officials for quiet title and declaratory relief are barred by the Eleventh Amendment because those claims are functionally equivalent to a damage action against the State. *Id.* at 37-40. The court determined that it "could enjoin the [state officials] if it were to find that the State is not the rightful owner of the disputed lands and waters." *Id.* at 40. The court ruled, however, that the Tribe's claims of ownership are "without foundation" in light of the Equal Footing Doctrine. *Id.* at 40-41. It accordingly held that the Tribe is not entitled to injunctive relief against the state officials. *Id.* at 40-47. See also *id.* at 3.

3. The court of appeals affirmed in part, reversed in part, and remanded the case for further proceedings. Pet. App. 1-28. The court of appeals agreed with the district court "that the Eleventh Amendment bars all claims against the State and the Agencies, as well as the quiet title claim against the Officials." *Id.* at 4. It accordingly affirmed the district court's dismissal of those claims. *Ibid*; see *id.* at 4-10, 21-22. Like the district court, the court of appeals concluded that the Eleventh Amendment does not bar the Tribe's claims against state officials for injunctive and declaratory relief that "seek only to

preclude future violations of federal law." *Id.* at 4, 10-23.

The court of appeals rejected, however, the district court's ruling that the Tribe had failed to state a valid claim for injunctive relief against the state officials. Pet. App. 4. The court of appeals recognized that the Equal Footing Doctrine creates a "strong presumption" against finding that the United States has conveyed submerged lands to the Tribe. *Id.* at 24 (citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981)). But the court of appeals noted that the Tribe was entitled to an opportunity to develop facts rebutting that presumption. Pet. App. 24-25. It also rejected petitioners' argument, made for the first time on appeal, that the President categorically lacked authority to create interests in submerged lands without express congressional authorization. *Id.* at 25-27. The court concluded that "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought" and that accordingly "dismissal for failure to state a claim was error." *Id.* at 27.

4. While the Tribe's case was under submission before the court of appeals, the United States filed a separate action against the State of Idaho respecting the Tribe's title to submerged lands. See Br. in Opp. App. 22-31. The Tribe has intervened in that action, which is currently in discovery and is scheduled for trial beginning on December 1, 1997.

SUMMARY OF ARGUMENT

A. The petition for a writ of certiorari presents two questions for this Court's review. The first question is whether the Coeur d'Alene Tribe may seek injunctive relief against state officers,

notwithstanding the Eleventh Amendment's recognition of state sovereign immunity, on the ground that the officers are exercising authority over tribal property under an erroneous claim of state ownership. The United States takes no position on that question. This Court has already addressed the sovereign immunity of the United States respecting real property disputes in *Block* v. *North Dakota*, 461 U.S. 273 (1983). The Court held that Congress intended the Quiet Title Act, 28 U.S.C. 2409a, to provide the exclusive means by which adverse claimants can challenge the United States' title to real property and that Congress accordingly has forbidden the use of officer suits against federal officials for that purpose.

B. If the Court concludes that the Eleventh Amendment bars an officer suit against state officials in the circumstances presented here, then the case must be dismissed without reaching the second question presented by the petition. But if the Court determines that the Tribe can sue the state officials, then the question arises whether the court of appeals properly reversed the district court's order dismissing the complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. If the Court resolves that question, we submit that the Court should affirm the court of appeals' ruling.

As this Court has repeatedly stated, a complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993); *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The district court

erred in dismissing the Tribe's claims because, as the court of appeals pointed out, "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought." Pet. App. 27. Although there is a "strong presumption" that title to lands beneath inland navigable waters passes to the new State upon its admission to the Union, that presumption is rebuttable. *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981). The Tribe is entitled to an opportunity to overcome the presumption based on the circumstances surrounding the creation and continuation of the Coeur d'Alene Reservation.

It would be particularly premature to dismiss the Tribe's complaint in this case, because the United States and Idaho are currently preparing for trial on the very question of the Tribe's title to submerged lands. If this Court concludes that the federal courts have jurisdiction over the Tribe's suit, that suit could be consolidated on remand with the United States' action, and the respective claims of Idaho, the United States, and the Tribe could be resolved in a single proceeding.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIBE'S SUIT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

A. The principal issue in this case is whether the Eleventh Amendment, which preserves the sovereign immunity of States from suit in federal courts, bars a private suit in which the plaintiff seeks to enjoin a state official from exercising authority over real property under a claim of state ownership. The United States takes no position on that issue, because

the Court's resolution of the question in this case is unlikely to affect the United States' sovereign interests.

The United States, like individual States of the Union, possesses sovereign immunity from private suit. Accordingly, "the United States may not be sued without its consent and * * * the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). In 1974, Congress enacted the Quiet Title Act (QTA), 28 U.S.C. 2409a, which provides a limited waiver of the United States' immunity from suit with respect to real property disputes. This Court concluded in *Block* v. *North Dakota*, 461 U.S. 273 (1983), that the QTA is "the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Id.* at 286.

The Court's decision in *Block* specifically rejected North Dakota's argument that a plaintiff who is unable to meet the QTA's conditions for suit against the United States can avoid those conditions by suing a federal officer on the theory that the officer is improperly exercising authority over the property based on an erroneous claim of ownership by the United States. In that case, North Dakota attempted to use "the device of an officer's suit" to "avoid the QTA's statute of limitations and other restrictions." 461 U.S. at 284. The Court foreclosed suit against the federal government on that basis, stating:

> If North Dakota's position were correct, all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. "It would require the suspension of disbelief to ascribe to Congress the

> design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Brown* v. *GSA*, 425 U.S. 820, 833 (1976).

Id. at 284-285.

In our view, the Court's decision in *Block* indicates quite clearly that a plaintiff may not bring suit to enjoin a federal official's actions respecting real property on the theory that the official's exercise of authority is predicated on a non-meritorious claim of federal ownership. Because the Court's construction of the QTA resolves the question of federal officer suits respecting real property, the United States does not have a substantial interest in the question of state immunity presented here.

B. If this Court determines that the Eleventh Amendment bars the Tribe's claims, then the case must be dismissed without reaching the second question presented by the petition. But if the Court determines that the Tribe may sue the state officials concerning rights in submerged lands, then the question arises whether the court of appeals properly reversed the district court's order dismissing the complaint for failure to state a claim upon which relief can be granted.

The court of appeals' ruling was, of course, interlocutory, and both courts below addressed the equal footing issue without any discussion of most of the Acts of Congress and agreements noted above, see pages 2-9, *supra*, much less the factual contexts in which they arose. See Pet. App. 24-27, 40-47. For those reasons, and because there is no circuit conflict on the granting of a Rule 12(b)(6) motion on a title claim in circumstances such as those presented here, the Court might decline to address that issue

at this time. If the Court chooses to reach the issue, however, we submit that the Court should affirm the court of appeals' ruling. The district court erred in dismissing the Tribe's claims because, as the court of appeals pointed out, "it is conceivable that the Tribe could prove facts that would entitle it to the relief sought." Pet. App. 27. Indeed, the United States and Idaho are currently preparing for trial on the very question of the Tribe's title to a portion of the submerged lands that the Tribe claims in this suit.

1. As this Court has repeatedly stated, a complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim on which relief can be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993); *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The court of appeals correctly concluded that petitioners' Rule 12(b)(6) motion must therefore be denied.

The Tribe's complaint alleges that the United States engaged in a course of dealing with the Tribe whereby the federal government failed to extinguish the Tribe's aboriginal title to the submerged lands within the 1873 boundaries of the Coeur d'Alene Reservation and actually conveyed those lands to, or reserved them for the benefit of, the Tribe before Idaho's admission to the Union. As a general principle, the United States holds lands beneath navigable waters in trust for future States. See *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 200-202 (1987); *Montana* v. *United States*, 450 U.S. 544, 551 (1981). But the United States may dispose of such

land prior to statehood to carry out public purposes, including the creation of an Indian reservation. *Id.* at 551, 556. See *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 86-87 (1918). There is a "strong presumption" that the United States did not convey submerged lands. *Montana*, 450 U.S. at 552. That presumption, however, is rebuttable. See, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970) (holding that the United States conveyed a portion of the bed of the Arkansas River to the Choctaw and Cherokee Indian Nations).

As the court of appeals correctly recognized (Pet. App. 24-25), the Tribe may overcome that presumption through proof of a contrary intent. That proof may take the form of evidence respecting the parties' understanding of the various Acts of Congress, agreements and Executive Orders, including evidence of the circumstances leading to the formation of the relevant documents and the subsequent conduct of the parties. See *Choctaw Nation*, 397 U.S. at 628-636. For example, in *Montana*, this Court denied the Crow Tribe's claim to the bed of the Big Horn River only after considering the language of the Treaty of Fort Laramie in its historical context. 450 U.S. at 553-556. The Court specifically distinguished *Choctaw Nation* based on "the unusual history of the treaties there at issue." *Id.* at 555 n.5. Similarly, it distinguished *Alaska Pacific Fisheries* on the basis of the Crow Tribe's history of non-use of the watercourse. *Id.* at 556 ("the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life").

The Court's decisions in *Montana*, *Choctaw Nation*, and *Alaska Pacific Fisheries* demonstrate that a Tribe may put forward evidence of special

circumstances to prove its ownership of submerged lands. In this case, the Coeur d'Alene Tribe can point to a number of considerations that distinguish its claim of title from that in *Montana*. For example, the 1873 Executive Order that defined the original extent of the Coeur d'Alene Reservation made specific reference to submerged lands by setting the boundary at "the center of the channel of [the] Spokane River." 1 C. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904); compare Br. in Opp. App. 8 (complaint) with *Choctaw Nation*, 397 U.S. at 631 & n.8. In addition, Congress later approved tribal cessions that explicitly drew boundary lines within the lake bed. See pages 7-8, *supra*. Furthermore, the Coeur d'Alene Tribe, unlike the Crow Tribe, has a long history of using the waters and submerged lands for fishing and other tribal and ceremonial purposes. Compare *Alaska Pacific Fisheries*, 248 U.S. at 86. In light of the distinguishing characteristics of the Coeur d'Alene Tribe's claims, the district court clearly erred in summarily dismissing the Tribe's suit. It is, at the very least, not "beyond doubt" that the Tribe can prove no set of facts that would entitle it to relief. See, *e.g.*, *Conley*, 355 U.S. at 45-46; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[O]n a motion to dismiss, we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' ").

Recognizing the inadequacy of the district court's analysis, petitioners attempt to defend the district court's decision on a rationale that was neither put before nor cited by the district court. See Pet. App. 37-47; J.A. 1-44. They assert that "the President may not convey submerged lands to Indian tribes without express congressional authorization." Pet. Br. 39.

The correctness of petitioners' assertion, however, is not self-evident, at least insofar as petitioners contend that the President is without authority to reserve submerged land for the benefit of an Indian Tribe in a manner that would prevent title to the submerged land from passing to the State at statehood. The Court has rejected similar challenges by other States to the validity of the President's Executive Orders setting aside land and water for Indian reservations. See *Arizona* v. *California*, 373 U.S. 546, 598 (1963). As the court of appeals noted, petitioners cite no authority holding that the President cannot also set aside submerged lands through an Executive Order. See Pet. App. 26-27. Compare *United States* v. *Alaska*, 423 F.2d 764 (9th Cir.) (rejecting State's claim of title to lake bed within wildlife reservation created by Executive Order), cert. denied, 400 U.S. 967 (1970).

As petitioners acknowledge through their reference to "explicit" authorization, Congress may authorize the conveyance or reservation of lands through ratification or recognition of the President's actions. Indeed, as petitioners concede, this Court has previously held that Congress, through acquiescence, implicitly delegated to the President the authority to withdraw portions of the public domain from settlement. *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). In this case, the Coeur d'Alene Tribe has a substantial argument that Congress did not merely acquiesce in the President's actions respecting the Coeur d'Alene Reservation, but also specifically recognized and ratified the President's actions with respect to the submerged lands therein through the series of statutes discussed above. Those statutes include the pre-statehood Act of Congress calling for

negotiations with the Tribe for cession of a portion of its Reservation, and the Statehood Act, which ratified the Idaho Constitution's disclaimer of any right to all lands "owned or held" by Indian Tribes. See pages 5-8, *supra*; compare, *e.g.*, *Holden* v. *Joy*, 84 U.S. (17 Wall.) 211 (1873). The question whether and to what extent those statutes confirmed the status of the Reservation and submerged lands can be definitively answered only through a full factual inquiry into the history of the federal actions respecting the Reservation.

Petitioners fault the court of appeals for "not critically examining the nature of the federal act creating the original Coeur d'Alene Reservation." Pet. Br. 44. But as the court of appeals recognized (Pet. App. 27), it cannot conduct such an examination in a factual vacuum. Indeed, petitioners' citation of *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317 (1942), illustrates the reason why that is so. Petitioners cite that case as demonstrating that the President cannot convey property through an Executive Order. They draw that conclusion from the Court's holding that the Sioux Tribe was not entitled to compensation for the diminishment of an Executive Order reservation. But the Court reached that conclusion based on the record before it, citing as "striking proof" the "very absence of compensatory payments in such situations." *Id.* at 330. This case, by contrast, presents a quite different factual situation, in which Congress refused to diminish the Coeur d'Alene Reservation in the absence of compensatory payments. For example, when a railroad sought a right of way through the Coeur d'Alene Reservation (apparently including a portion of the lake bed), Congress expressly conditioned the grant of the right of way upon

the consent of the Tribe and payment of compensation. Act of May 30, 1888, ch. 336, § 3, 25 Stat. 161. Thus, it is far from clear that *Sioux Tribe* has a significant bearing on the case presented here. It therefore provides no basis for dismissal at a preliminary juncture of the litigation.

2. Petitioners' argument that the Court should reinstate the district court's dismissal under Rule 12(b)(6) is particularly inappropriate in the context of this case. As petitioners are well aware, the United States, as trustee for the Tribe, has filed a separate action asserting that the Tribe has a beneficial interest in a portion of the submerged lands at issue in this case. See Br. in Opp. App. 22-31. The United States claims only a portion of the bed of Lake Coeur d'Alene on behalf of the Tribe, but the relevant facts and substantive legal issues in that suit significantly overlap with those that would be presented in this case. The State of Idaho and the United States are currently engaged in the preparation of expert testimony reports, which are due to be exchanged between the parties in the coming months. Discovery will close on February 14, 1997, and the case is scheduled to go to trial on December 1, 1997. See *United States* v. *Idaho*, No. CV 94-328-N-EJL, Scheduling Conf. Order at 2, 4-5 (D. Idaho Mar. 12, 1996).

Petitioners, who make no mention of that pending litigation, would have this Court dismiss the Tribe's claims on the merits without regard to the fact that the State of Idaho is currently litigating in another forum the question of title to submerged lands on the Reservation. Petitioners' suggested course of action would improvidently interfere with ongoing litigation that would provide exactly the sort of factual development that the court of appeals has determined is

needed for decision in this case. Accordingly, if the Court concludes that the district court in this case has jurisdiction to decide the Tribe's claims, and then reaches the question of the dismissal of the Tribe's complaint on the merits, it should affirm the court of appeals' reversal of the district court's order of dismissal. The result of that disposition would simply be to return this case to the district court for further proceedings. This suit could then be consolidated with the United States' pending action, and the respective claims of Idaho, the United States, and the Tribe could then be resolved in a single proceeding.

CONCLUSION

If the Court reaches the second question presented, it should affirm the judgment of the court of appeals.

Respectfully submitted.

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